

**OPINION  
72-287**

March 1, 1972           (OPINION)

Mr. Rodney S. Webb  
State's Attorney  
Walsh County

RE: Real Estate - Mortgages - Rate of Interest

This is in response to your letter in which you ask for an opinion on the following questions:

1. May a mortgage on real property be recorded, in the state of North Dakota, which does not contain a stated rates of interest?
2. Are Production Credit Associations exempted from the provision of the Usury Laws specified in Chapter 47-14 of the North Dakota Century Code?"

For our benefit you have furnished us with a copy of the mortgage form and the promissory note in connection therewith.

As to the question, section 35-03-04 provides as follows:

PREREQUISITES FOR RECORDING - ACKNOWLEDGED OR PROVED - POST OFFICE ADDRESS OF MORTGAGEE OR ASSIGNEE - DESCRIPTION OF INDEBTEDNESS. No mortgage of real property shall be received for record by the register of deeds unless it contains the post office address of the mortgagee and a complete description of the indebtedness secured as to the amount, rate of interest, and when and where due. No assignment of a mortgage on real property which does not contain the post office address of the assignee shall be received for record."

The foregoing language is clear and unambiguous. It specifically requires that the rate of interest be stated in the mortgage. The present form merely states "with interest, according to the terms of a demand promissory note bearing even date herewith". The promissory note states the initial rate of interest and then provides that the interest rate may fluctuate and if it does so, the unpaid balance will be subject to the interest rate in effect at the time. We would thus observe that the rate of interest is not stated in the mortgage, but is only stated in the promissory note and there it provides for a fluctuation of rate depending upon the money market.

We must also take into account the provisions of section 35-05-05 which sets forth the mortgage form and the substantive material which is to be set fort in such form. One of the items specifically mentioned is the interest rate. In addition to this, the form also sets forth the pertinent conditions of the promissory note. This, of course, is absent in the mortgage form you submitted for our consideration.

Examination of text references on the subject matter is not very

helpful except the general statement that the statutes of the states govern and control whether or not the instrument may be recorded.

We do not have any court decisions specifically on the subject matter, but we have a decision from the North Dakota Supreme Court in another instance where the statutes require certain things to be accomplished before it may be legally recognized as valid. This is in respect to the statutory provisions, section 16-13-01, North Dakota Century Code, which spell out what must be accomplished in order to count a ballot at an official election. In this instance the statute says that "a ballot shall be void and shall not be counted if: (1) It is not endorsed with the official stamp and initials as provided in this title; or (2) It is impossible to determine the elector's choice from the ballot or parts of a ballot."

The North Dakota Supreme Court in more than one instance said and held that a ballot which is not endorsed by the official stamp and is not initialed pursuant to the statute cannot be counted. The court said this was a mandatory provision and cannot be overlooked.

By applying the same rationale to the provisions of section 35-03-04, we would come to the conclusion that those provisions are mandatory.

It is therefore our opinion in response to your first question that a mortgage which does not state the rate of interest is not eligible or entitled to be recorded.

As to the second question, it is necessary to examine the provisions of section 47-14-09 which provide as follows:

47-14-09. USURY - DEFINITION - MAXIMUM CONTRACT RATE - PROHIBITION. Except as otherwise provided by the laws of this state, no person, copartnership, association, or corporation, either directly or indirectly, shall take or receive, or agree to take or receive, in money, goods, or things in action, or in any other way, any greater sum or greater value for the loan or forbearance of money, goods, or things in action than three percent per annum higher than the maximum rate of interest payable on deposits authorized by the state banking board under section 6-03-63, but that in any event the maximum allowable interest rate ceiling shall not be less than seven percent, and in the computation of interest the same shall not be compounded. This section shall not apply to a loan made to a foreign or domestic corporation, or a cooperative corporation or association, nor to any business loan the principal amount of which amounts to more than twenty-five thousand dollars. No contract shall provide for the payment of interest on interest overdue, but this section shall not apply to a contract to pay interest at a lawful rate of interest that is overdue at the time such contract is made. Any violation of this section shall be deemed usury."

In addition to this, we must also examine the provisions of section 6-03-47 as amended which provides as follows:

6-03-47. INVESTMENT IN LOANS AND OBLIGATIONS SECURED BY FEDERAL OR STATE GOVERNMENT. Banks, trust companies, the Bank

of North Dakota, building and loan associations, insurance companies, and other organizations in this state whose mortgage lending is regulated by law, or that are duly qualified federal housing administration mortgagees, are authorized to make, buy or sell any loan, advances of credit, and obligations representing loans and advances of credit that are insured or guaranteed, or where there is a commitment to insure or guarantee, in part or in full, or conditionally, by the United States, its instrumentalities, this state, or its instrumentalities."

Under the provisions of section 6-03-50, loans made under the provisions of section 6-03-47 are exempt from the provisions of section 47-14-09. However, before such transaction is exempt, it must come within the provisions of section 6-03-47.

It is our understanding that the PCA is not an instrumentality of the United States Government. We do not know if any of its transactions in extending credit or making loans are insured or guaranteed by the United States Government or any of its instrumentalities.

It is therefore our opinion that unless the association comes within the provisions of section 6-03-47, the provisions of section 47-14-09 would apply.

HELGI JOHANNESON

Attorney General